

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,)	No. 64915-9-I
)	
Respondent,)	
)	
v.)	
)	
HEZZIE ALEX BAINES,)	UNPUBLISHED OPINION
)	
Appellant.)	FILED: July 12, 2010
)	

Ellington, J. — Hezzie Baines appealed his conviction on one count of attempted residential burglary, arguing that prosecutorial misconduct requires reversal. Baines died while his appeal was pending. We grant his widow's motion for substitution and we conclude that the prosecutor committed prejudicial misconduct by misstating the jury's role and the burden of proof. Accordingly, we reverse.

BACKGROUND

Hezzie Baines was charged with second degree burglary and attempted residential burglary, each with a deadly weapons enhancement. The trial court dismissed the deadly weapon allegation before the case went to the jury. At trial, witnesses testified to the following events.

On August 13, 2007, at 5:30 or 6:00 p.m., Eric Sylstad returned to his home in Midland, Washington. Sylstad testified that as he pulled his truck into the gravel

driveway, he saw two men on the back deck of his home. One jumped off the deck and escaped. The other walked off the deck, cut through Sylstad's carport, and then started to run.

Sylstad jumped out of his truck and gave chase, demanding to know what the man was doing on his property. The man turned and flung Sylstad's daughter's plastic t-ball bat at him, saying, "I am not breaking into your house."¹ Sylstad shouted back, "[I]f you're not F-ing breaking into my house, what are you doing on my property?"² As the man climbed over the back fence, Sylstad yelled that he was calling the police. The man ran across Sylstad's neighbor's yard, struggled to climb over the barbed-wire fence, and fell face first on the ground on the other side.

Sylstad told the emergency operator which way the suspect was headed, and she instructed him to return to his driveway to meet the responding officer, Deputy Walter Robinson. A few minutes later, they learned that a suspect had been taken into custody. Deputy Robinson transported Sylstad to the scene of the arrest, where Sylstad identified the suspect. The man, who was later identified as Hezzie Baines, was bleeding profusely from his head at the time Sylstad identified him.

When Sylstad returned home, he discovered that the wooden door jamb of his French-style back door was "busted up"³ near the lock, and the rubber weather-stripping was damaged. Sylstad's family used that door as their regular entrance, and he was confident that the damage was not there on the previous day. Sylstad thought

¹ Report of Proceedings (RP) (Dec. 10, 2008) at 53.

² Id.

³ Id. at 59.

it looked “[l]ike somebody was jamming an object in there and trying to get in.”⁴ Deputy Robinson testified that he looked around the property, but he gave no details regarding the condition of the door.

Sylstad testified that his neighbor later found Sylstad’s screwdriver near where Baines had climbed over the barbed wire fence. The top of the screwdriver looked like someone had pounded it with another object. Sylstad was confident that the damage to his door had been caused by the screwdriver, because “I took the screwdriver, just like that, and matched it perfectly with the markings that were the beatings on my door.”⁵ However, Sylstad admitted that he did not see Baines doing anything to his back door or carrying a screwdriver. The screwdriver was not offered as evidence.

Sylstad thought the screwdriver and his daughter’s bat had been stored in the hot tub enclosure on his deck. He noticed that the door to the hot tub enclosure was open, although he locked it the night before. Baines’ fingerprints were not found on the bat.

Baines testified that he was not trying to break into Sylstad’s house that day. Rather, he was trying to get his keys back from his friend, Troy Walker. Baines said that Walker, whom he had not seen in years, showed up unexpectedly at his house on the afternoon of the incident. Walker was loud and intoxicated. When Baines’ wife Jennifer came home, she told Baines to make Walker leave. Baines, his wife, and Walker then went for a drive. Walker wanted to buy more alcohol, but Baines decided

⁴ Id. at 62.

⁵ Id. at 68. The trial court overruled defense counsel’s objection that Sylstad did not have the expertise necessary to testify as to whether the screwdriver caused the damage, stating that it went to the weight of his testimony.

to stop at a park in east Tacoma. At the park, Walker grabbed Baines' keys and said he would be back. When Baines tried to stop him, Walker hit him and ran away with the keys.

Baines testified he chased Walker onto Sylstad's property, where they continued fighting. Baines said they were never on the deck, only in the yard. Baines picked up a small bat he found lying in the yard and swung it at Walker in self-defense. At that point, Sylstad returned home, saw the men, and accused them of attempting to break in. Walker ran away, but Baines stopped and told Sylstad they were not trying to break in. Baines also told Sylstad he needed help because Walker beat him up and took his keys. Baines said he ran away when Sylstad called 911 because he had an outstanding warrant and did not want to go to jail. Baines testified he did not swing the bat at Sylstad, but rather dropped it when he jumped over the fence. Baines insisted he never attempted to break into Sylstad's house, never entered the hot tub enclosure on the deck, and never picked up a screwdriver.

Baines' wife Jennifer also testified for the defense. She confirmed that Walker had arrived at their house drunk, and that Baines had asked her to go for a ride with him and Walker. Walker was arguing the whole way because he wanted to stop for alcohol. They drove to a park, where Jennifer got out of the car to watch some children playing football. She saw Walker run off with the car keys and saw Baines giving chase, but continued to watch the game. Baines did not return, so she took a bus home and called her mother to ask for a ride back to the park to retrieve the car. She later found out that her husband had been arrested. Jennifer's mother testified that she

gave her daughter a ride to someplace in east Tacoma that day.

The jury acquitted Baines of second degree burglary but convicted him of attempted residential burglary. Baines timely appealed.

On April 1, 2010, Baines died while his appeal was pending. On April 26, 2010, Jennifer filed a motion for substitution of party under RAP 3.2 for the purpose of continuing her late husband's appeal. The State did not file a written response. In State v. Webb,⁶ the Washington Supreme Court recently held that "when a decedent dies during the pendency of his or her appeal, that appeal may be pursued by a party substituted under the provisions of RAP 3.2." Under RAP 3.2(a), "[t]he appellate court will substitute parties to a review when it appears that a party is deceased or legally incompetent or that the interest of a party in the subject matter of the review has been transferred."

We grant Jennifer Baines' motion for substitution and consider the appeal.

DISCUSSION

Baines asserts the prosecutor committed multiple incidents of reversible prosecutorial misconduct. A defendant alleging prosecutorial misconduct bears the burden of showing both improper conduct and prejudicial effect.⁷ To establish prejudice, the defendant must show a substantial likelihood that the misconduct affected the jury's verdict.⁸

Defense counsel did not object to the challenged arguments below. "A

⁶ 167 Wn.2d 470, 478, 219 P.3d 695 (2009).

⁷ State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997).

⁸ Id.

defendant who fails to object to an improper remark waives the right to assert prosecutorial misconduct unless the remark was so ‘flagrant and ill-intentioned’ that it causes enduring and resulting prejudice that a curative instruction could not have remedied.”⁹ “We review a prosecuting attorney’s allegedly improper remarks in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury.”¹⁰

“Every prosecutor is a quasi-judicial officer of the court, charged with the duty of ensuring that an accused receives a fair trial.”¹¹ We conclude that the prosecutor violated this duty during closing and rebuttal argument by misstating the law regarding the jury’s role and the State’s burden of proof.¹²

During closing argument, the prosecutor made the following comments:

I want to start with a choice you’re presented with in this case, because you’re really presented with just a choice. One of two things: Either the defendant is guilty or you accept a story from the defendant that does not pass a straight face test, meaning it is not a story that you can really tell without keeping that face straight without laughing, that is not consistent with the evidence, that requires you to find that the victim is lying and/or grossly mistaken.^[13]

. . . .

Again, you have a choice between who is telling the truth here.^[14]

⁹ State v. Boehning, 127 Wn. App. 511, 518, 111 P.3d 899 (2005) (quoting State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994)).

¹⁰ State v. Anderson, 153 Wn. App. 417, 427, 220 P.3d 1273 (2009).

¹¹ Boehning, 127 Wn. App. at 518.

¹² Baines did not argue that the manifest constitutional error standard of review applies to this type of prosecutorial misconduct. Even if we applied that standard of review here, the result would be the same because the error was not harmless beyond a reasonable doubt.

¹³ RP (Dec. 10, 2008) at 171.

. . . .

. . . So you have two choices, Mr. Sylstad or the defendant. Who do you believe? Who has every motivation to lie? Who has every reason to tell you something that is not the truth? Is it Mr. Sylstad, who got up on the stand and told you what he saw, what he heard, and what he discovered that night?

Mr. Sylstad has no reason to lie to you. I don't need to tell you that. You know that. You know because he's the victim of burglary. He has no reason to jeopardize his future, jeopardize his family, jeopardize his living by telling you anything other than the truth. The defendant has every reason to lie and tell you something other than the truth, and you know that he does so.^[15]

In rebuttal closing argument, the prosecutor stated:

You know, ladies and gentlemen, if you have reason to doubt Mr. Sylstad, if you think that Mr. Sylstad got up there and told you a pack of lies, then by all means find the defendant not guilty. If you think that Mr. Sylstad wanted this, if you think he wanted to be harassed for the last 16 months of his life, he wanted his daughter to be sleeping in his bed for three months, if you think he wanted to have to spend money to replace the doors, if you think that he wanted police showing up at his house and you think that he wanted the worry and panic that comes with not knowing where your daughters are on the night of the burglary, if you think he wanted that and he decided to get up here and lie and tell you a bunch of things that aren't true, then by all means find the defendant not guilty.

. . . .

. . . In the end, if you believe Mr. Sylstad was coming in here and being forthright with you and being a straight-up guy and telling you what occurred, then the defendant is guilty because there wasn't somebody else.^[16]

It is misconduct "for a prosecutor to argue that, in order to *believe* a defendant, a jury must find that the State's witnesses are *lying*."¹⁷ It is also "misleading and unfair to

¹⁴ Id. at 174.

¹⁵ Id. at 175–76.

¹⁶ Id. at 199–200.

make it appear that an acquittal requires the conclusion” that the State’s witnesses are lying.¹⁸ Such arguments incorrectly present the jury with a false choice between believing the witnesses are lying or telling the truth, because “[t]he testimony of a witness can be unconvincing or wholly or partially incorrect for a number of reasons without any deliberate misrepresentation being involved.”¹⁹ These arguments also misstate the burden of proof and the jury’s role because the jury is not required to determine who is telling the truth and who is lying in order to perform its duty.²⁰ Rather, the jury’s role is to determine whether the State has met its burden of proving the case beyond a reasonable doubt.²¹ Here, the prosecutor argued that the jurors had to decide who was lying and who was telling the truth and had to find that Sylstad was lying in order to acquit. These arguments constituted flagrant misconduct.

The State properly concedes the prosecutor misstated the burden of proof by arguing that the only options available to the jury were to find Baines guilty or to believe his story. Rather, the jury was required to acquit if the State failed to prove each element of the crime charged.

The State argues, however, that any error was not prejudicial because the evidence supporting the conviction was overwhelming. We disagree. The jury’s verdict turned almost entirely on the credibility of Sylstad and Baines. The State did not offer

¹⁷ State v. Wright, 76 Wn. App. 811, 826, 888 P.2d 1214 (1995) (superseded on other grounds by RCW 9.94A.360(6)).

¹⁸ State v. Castaneda-Perez, 61 Wn. App. 354, 362–63, 810 P.2d 74 (1991).

¹⁹ Id. at 363.

²⁰ Wright, 76 Wn. App. at 826.

²¹ Id.

